

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

NORTHWEST AQUATIC ECOSYSTEMS,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent,

WASHINGTON TOXICS COALITION,

Intervenor.

PCHB NO. 05-101

FINDINGS OF FACT,  
CONCLUSIONS OF LAW and  
ORDER

Appellant, Northwest Aquatic Ecosystems (Northwest Aquatic), is challenging Ecology's denials of coverage under the NPDES Waste Discharge General Permit for Aquatic Nuisance Plant and Algae Control for Meydenbauer Yacht Club, Skinner Development Carillon Point, and Harbor Village Condominiums. Washington Toxics Coalition (WTC) was allowed to intervene in the case by prior Board order. A hearing was held in the case on January 27, 2006, at the Environmental Hearings Office in Lacey, Washington. Douglas Dorling, proprietor, represented Northwest Aquatic, Ronald L. Lavigne, Assistant Attorney General, represented Ecology, and WTC members Rob Hatfield and Christina Richmond represented WTC. Administrative Appeals Judge, Phyllis Macleod, presided for the Board comprised of William H. Lynch and Kathleen D. Mix. Kim Otis of Gene Barker and Associates, Olympia, Washington, recorded the proceedings.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER  
PCHB NO. 05-101

1 Witnesses were sworn and heard, exhibits were introduced, and the parties presented  
2 arguments to the Board. Based upon the evidence presented, the Board makes the following:

3 FINDINGS OF FACT

4 1.

5 Ecology is responsible for regulating the application of herbicides and algaecides into the  
6 waters of Washington State, in part, through its delegated operation of the National Pollutant  
7 Discharge Elimination System (NPDES) permit system. (RCW 90.48.260). On June 13, 2002,  
8 Ecology exercised this responsibility by issuing a general permit governing the application of  
9 herbicides and algaecides known as the Aquatic Nuisance Plant and Algae Control National  
10 Pollutant Discharge Elimination System Waste Discharge General Permit. (Nuisance Permit).  
11 The permit became effective on July 5, 2002 and has a term of five years, expiring in July 2007.

12 2.

13 Northwest Aquatic is a company that provides treatment designed to control aquatic  
14 plants and algae in a number of lakes and sites within the state. In 2005, Northwest Aquatic  
15 applied for coverage under the Nuisance Permit for proposed pesticide applications targeting  
16 nuisance weeds at Skinner Development Carillon Point, Harbor Village Condominiums, and  
17 Meydenbauer Bay Yacht Club. All of these sites are located on Lake Washington. While some  
18 of the sites had been treated in past years for noxious weed problems, this was the first  
19 application for each site under the Nuisance Permit.

1 3.

2 The coverage applications included maps depicting the weeds present on the sites and the  
3 targeted species for treatment. All three sites contained a mix of nuisance and noxious weeds.  
4 The applications indicated Northwest Aquatic proposed to use endothall and diquat to treat  
5 targeted nuisance weeds. The chemicals proposed for use on the targeted nuisance weeds are  
6 also known to control many of the noxious weeds present on the sites.

7 4.

8 In evaluating the permit applications, Ecology visited each of the three locations.  
9 Ecology employees, Tricia Shoblom and Margaret Hill, performed an inspection of the  
10 Meydenbauer Bay Yacht Club site on June 28, 2005, at 10:30 a.m. The inspectors visually  
11 observed the 10-acre site from a position on a dock. They threw a rake attached to a rope  
12 approximately twenty feet into the water to collect weed samples. They took three to four  
13 samples at the site. The inspectors determined that the majority of the aquatic plants present  
14 were noxious weeds Brazilian Elodea and Eurasian milfoil. These plants were intermixed with  
15 native nuisance plants Potamogeton and Ceratophyllum species. (Ex R-8). The inspectors did  
16 not contact the site manager to obtain access to the locked portions of the dock and did not use a  
17 boat to evaluate the distribution and proportion of nuisance to noxious weeds on the site.

18 5.

19 The Harbor Village Yacht Club inspection was performed on June 28, 2005, at 12:30  
20 p.m. by Ecology employees Tricia Shoblom and Margaret Hill. Sampling methods similar to  
21 those at Meydenbauer Bay were used. A rake attached to a rope was thrown three to four times

1 from one pier to obtain samples. Visual observation from one pier was also conducted. The  
2 inspectors did not notify the site manager of the inspection or obtain access to the locked  
3 portions of the marina facility. Based on the visual observations and the samples, the inspectors  
4 concluded the majority of the aquatic plants present were noxious weeds Brazilian Elodea and  
5 Eurasian milfoil. Nuisance plants were also present including native milfoils and elodea. (Ex.  
6 R-9).

7 6.

8 The Skinner Development Carillon Point inspection was conducted on June 29, 2005, at  
9 10:30 a.m. by Ecology employee, Tricia Shoblom. The record is unclear as to whether Margaret  
10 Hill accompanied Ms. Shoblom on this inspection. The inspector collected three to four samples  
11 using the rake attached to a rope technique. Visual observations were also made from a position  
12 on the shore or dock. The inspector(s) did not notify the site manager to obtain access to locked  
13 portions of the facility. The inspector(s) determined the majority of the aquatic plants present  
14 were noxious weeds such as Eurasian Milfoil and White Water Lily. Nuisance plants including  
15 native milfoil and elodea were inter-mixed with the noxious weeds. (Ex. R-10)

16 7.

17 While a boat survey of the three 10-acre sites would have been more thorough and  
18 accurate, the sampling technique used by the Ecology inspectors was efficient and cost-effective.  
19 It also allowed a timely response to the applications. Ecology witnesses indicated they were not  
20 aware if the agency has specific standards or protocols for determining the presence of species in  
21 the course of evaluating an application for aquatic weed treatment. The agency does have

standards and practices used in developing the data for studies intended for publication. Surveys for published studies are done from a boat and use multiple samples based on GPS points. A diver is also used as necessary. Ecology does own certain boats, but they are not readily available in the summer months for the type of inspection at issue in this case. They are more frequently allocated for use in formal Ecology surveys conducted in connection with published studies. (Hamill testimony).

8.

Tricia Shoblom was not able to state the percentage of plants that were Eurasian Milfoil or Brazilian Elodea at any of the inspected sites, but she was convinced that the majority of the aquatic plants present in each case were noxious weed species. This is consistent with Ecology employees' general knowledge of conditions on Lake Washington and the invasive habits of the noxious weeds involved.

9.

The applications submitted for these three sites contained maps depicting the types of aquatic plants present at each site. The maps were developed by Northwest Aquatics based on surveys conducted at the end of the 2004 treatment season. The surveys at each site were performed from a boat and involved samples from 40-50 rope pulls. However, no detailed information was presented to the Board indicating the date/time of the surveys, the data obtained, the sampling methodology used for the surveys, or the actual results. Mr. Dorling testified he believed that nuisance weeds were greater in biomass than the noxious weeds on the sites. He further asserted that as to floating weeds, noxious weeds would have comprised a higher

1 proportion than nuisance weeds. When asked during his deposition about the proportion of  
2 nuisance to noxious weeds at the Harbor Village site, he responded he guessed it was about 50-  
3 50. He posited that the prior use of the herbicide 2-4-D, which has a greater impact on noxious  
4 weeds, might have swung the balance towards a predominance of nuisance weeds on the sites.

5 10.

6 Ecology witness Hamill indicated the Department relies on the applicant to provide  
7 accurate maps of the proposed treatment site. In this case, however, Ms. Shoblom indicated  
8 Ecology considered the maps a “best guess” and did not give them serious consideration.  
9 (Testimony of Shoblom). Based upon the visual observations, samples, and knowledge of weed  
10 behaviors in the area, Ecology denied the permits on the basis that they were not primarily for  
11 the treatment of nuisance weeds and would have more than an incidental impact on noxious  
12 weeds. (Shoblom testimony).

13 11.

14 The aquatic weed treatment season runs primarily through the summer months.  
15 Coverage under the NPDES general permits governing aquatic weed treatments is extended for  
16 one-year increments. Each year a new application for coverage must be filed. At this point in  
17 time, coverage for the summer 2005 season cannot be obtained as a remedy in this case.

18 12.

19 Respondents argued that the applicants should have sought coverage under the Aquatic  
20 Noxious Weed Control National Pollutant Discharge Elimination Systems Waste Discharge  
21 General Permit. (Noxious Permit). The Noxious Permit and the Nuisance Permit are similar in

1 most critical areas. The same chemicals are allowed, in the same concentrations. The noxious  
2 permit sanctions the use of a few additional pesticides. The noxious permit was developed to  
3 provide a quick and easy permit process so outbreaks of noxious weeds could be addressed  
4 swiftly with the goal of eradication. Coverage under the Nuisance Permit was designed to  
5 provide more regulatory oversight because native plants that become a nuisance also have habitat  
6 values. The nuisance weed coverage program focuses on balance between competing uses,  
7 rather than eradication. The Nuisance Permit requires newspaper advertising, has a longer  
8 review period, and requires an annual fee. By design, coverage under the Noxious Permit was  
9 much easier and quicker to obtain than coverage under the Nuisance Permit. (Hamill testimony).

10 13.

11 In 2004, the Washington Toxics Coalition filed suit against the Washington Department  
12 of Agriculture for violating the Clean Water Act and sections of the Noxious Weed Permit in  
13 allowing coverages for the treatment of noxious weeds in Lake Washington. Agriculture was  
14 operating under a permit coverage issued by Ecology and was extending coverage to individual  
15 applicants under the Agriculture permit. Agriculture and WTC entered into a consent decree  
16 resolving the litigation on June 29, 2005. Under this consent decree, the system of extending  
17 coverage under the Agriculture permit was largely terminated. Any applicant seeking approval  
18 under the Noxious Permit was required to be part of a program for weed control sponsored by  
19 the Department of Agriculture or other similar public sponsor. (Consent Decree, Washington  
20 Toxics Coalition v. Loveland, NO. CV04-2040 RSL (2005). As a result, the type of coverage  
21 previously available under the Noxious Permit was no longer available to private applicants such

1 as the marinas in question. The impact of the Decree on the 2005 treatment season was  
2 substantial. In 2004, approximately 100 entities on Lake Washington were granted coverage  
3 under the Noxious Permit. In 2005, only two entities, both public, were granted coverage to treat  
4 weeds in Lake Washington under the Noxious Permit. (Hamill Testimony)

5 14.

6 Ecology is now in the process of developing a new permitting regime for aquatic weed  
7 treatment. The proposed permit being circulated for comment is apparently a state-issued waste  
8 discharge general permit under RCW 90.48, combining provisions for the treatment of noxious  
9 and nuisance weeds. Ecology hopes to issue the new permit in March 2006. The new permit  
10 terms will expressly rescind the existing Noxious Permit and Nuisance Permit. At the time of  
11 the hearing, the Nuisance Permit was still in effect and is set to expire in July 2007. (Hamill  
12 Testimony). If the new permit process is not adopted before the 2006 treatment season, the  
13 result in this case will provide guidance to Ecology in handling further applications under the  
14 Nuisance Permit.

15 15.

16 The Toxics Coalition provided evidence from the Supplemental Risk Assessments of  
17 Aquatic Herbicides: Study No. 00713 (Ex. I-25) addressing the persistence of diquat in aquatic  
18 ecosystems. Similar material for endothall was also included in the record. (Ex I-13). The  
19 written material was not conclusive on the actual fate of these chemicals and no expert witness  
20 was presented to further explain the material. Northwest Aquatic presented no testimony on the  
21 persistence of diquat or endothall in aquatic ecosystems.



16.

Any Conclusion of Law deemed to be properly considered a Finding of Fact is hereby adopted as such.

From the foregoing Findings of Fact, the Board makes the following,

#### CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the parties and the subject matter of this case under RCW 43.21B.110(1)(c). The case is reviewed *de novo*, and the Board gives deference to Ecology's expertise as the administering agency for NPDES permits. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 90 P.3d 659 (2004). The appellant Northwest Aquatic has the burden of proof in challenging Ecology's permit denial.

2.

The Toxics Coalition argues this case is moot because the Board can no longer grant effective relief to Northwest Aquatic for the 2005 aquatic weed treatment season. A case is considered moot if a court can no longer provide effective relief. *Orwick v. Seattle*, 103 Wn. 2d 249, 253, 692 P.2d 793 (1984); *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). The courts will generally not review a case that has become moot because of the danger of an erroneous decision being issued caused by the failure of the parties to zealously advocate their position.<sup>1</sup> An exception can be made, however, for moot cases involving "matters of continuing

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<sup>1</sup> In this case, since the mootness argument was not raised until the hearing, there is no risk the parties would fail to zealously advocate their positions during the proceedings.

1 and substantial public interest.” *Orwick*, at 253; *Sorenson v. Bellingham*, 80 Wn.2d 547, 558,  
2 496 P.2d 512(1972). The criteria for deciding whether a case, although moot, is reviewable  
3 under the substantial public interest test are: (1) whether the issue is of a public or private  
4 nature, (2) whether an authoritative determination is desirable to provide future guidance to  
5 public officers, and (3) the likelihood the issue will recur in the future.

6 3.

7 Decisions involving the interpretation of the constitution, statutes, and regulations tend to  
8 present issues which are more public in nature, are likely to arise again, and provide needed  
9 guidance to public officers. *Hart* at 449. The appeal needs to address the public at large rather  
10 than a specific community. *Harvest House Restaurant v. Lynden*, 102 Wn.2d 369, 685 P.2d 600  
11 (1984).

12 4.

13 In this case, Ecology is planning to issue a new permit governing the application of  
14 chemicals to control aquatic weeds. At this point in time, however, the new permit program is  
15 not in place and there is no certainty when it will become effective. If, for whatever reason, the  
16 new permit program is not effective for the 2006 treatment season, the Nuisance Permit and the  
17 Noxious Permit may still be the applicable regulatory program. In such a case, the outcome of  
18 this dispute would provide guidance to Ecology and the regulated community about the proper  
19 interpretation of the Nuisance Permit to sites containing a mixture of weeds. Accordingly, the  
20 Board concludes the case meets the public interest exemption from the mootness doctrine and  
21 should be decided.

1 5.

2 The applicants in this case sought coverage under the Nuisance Permit. The Nuisance  
3 Permit addresses the proper scope of its coverage at Condition S2:

4 Applications under this permit shall be primarily for the control of  
5 nuisance plants, nuisance plants near surface waters, algae, and for  
6 noxious aquatic plants which may be incidentally impacted in the course  
of treating for nuisance plants. A separate permit covers control of listed  
7 noxious aquatic weeds and weeds on the quarantine list in aquatic  
environments.

8 Permit No. WAC-994000, Condition S2. The Board denied Summary Judgment in this case  
9 because it was unclear from the record whether the weeds in the proposed treatment areas were  
10 primarily nuisance weeds or primarily noxious weeds.

11 6.

12 The testimony addressing the mix of noxious weeds and nuisance weeds on the  
13 application sites was in conflict. Mr. Dorling gave very general testimony that nuisance weeds  
14 were more prevalent than noxious weeds at these sites. He referred to the biomass of the  
15 material, rather than other potential measures. His opinion was based on end of the season  
16 surveys several months prior to the application and a December 2005 visit to the sites prior to the  
17 hearing. Ecology performed site inspections at the time the permit was being considered. This  
18 gave them information about the makeup of the weed population during the actual treatment  
19 season. While Ecology's technique was very minimal for characterizing weeds on 10-acre sites,  
20 it did utilize recognized criteria, such as weed sampling, visual observation and knowledge of the  
21 area. Northwest Aquatic bears the burden on proof on the issue of whether the permit was

1 primarily for the treatment of nuisance weeds. Northwest Aquatic's evidence would be more  
2 persuasive if the samples were taken closer in time to when the permit was being considered, and  
3 if it could produce some physical record of the results of the samples. Given the largely  
4 unrefuted evidence presented by Ecology that a majority of the weeds on the sites were noxious,  
5 Northwest Aquatic has failed to meet that burden.

6 7.

7 The Board is convinced that the Nuisance Permit could be used to treat a mixture of  
8 nuisance and noxious weeds if the applicant is able to make a clear showing through timely and  
9 documented surveys that nuisance weeds form the majority of the weeds on the proposed  
10 treatment site. If the application for Nuisance Permit coverage is for an area primarily composed  
11 of nuisance weeds, the language of Condition S2 allows incidental impact on noxious weeds. In  
12 this case, the evidence was insufficient to establish that the majority of the aquatic weeds were  
13 nuisance weeds or that the impact on noxious weeds would be merely incidental.

14 8.

15 Northwest Aquatic argued that Ecology lacked an adopted standard for determining  
16 whether an application was primarily for the control of nuisance plants. In the absence of an  
17 adopted standard, Northwest Aquatic believed its characterization should stand. The Board is  
18 not convinced that a more detailed standard is needed to apply Condition S2 of the Nuisance  
19 Permit. Ecology determines the composition of weeds on a given site on a case-by-case basis at  
20 the time coverage is sought. Examining the specific facts and circumstances present on a  
21 proposed site allows the agency to consider the unique facts of each application. In the absence

1 of any authority mandating an administrative rule-making approach to implementing the  
2 Nuisance Permit, Northwest Aquatic is entitled to no relief on this point.

3 9.

4 Northwest Aquatic also renewed its summary judgment argument that the Board should  
5 rule NPDES permit coverage is not needed for the application of aquatic pesticides, when they  
6 are applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).  
7 Northwest Aquatic bases this argument on the recent federal court decision in *Fairhurst v.*  
8 *Hagener*, 422 F.3d 1146 (9<sup>th</sup> Cir. 2005). The Board ruled on summary judgment that the  
9 *Fairhurst* decision does not provide a blanket exemption for the application of aquatic pesticides.  
10 Identified conditions must be met before a pesticide can be considered outside the category of a  
11 pollutant under the Clean Water Act. The pesticide must: (1) be applied for a beneficial purpose,  
12 (2) be applied in compliance with FIFRA, (3) produce no pesticide residue, and (4) produce no  
13 unintended effects. *Fairhurst*, 422 F.3d at 1150.

14 10.

15 Northwest Aquatic failed to provide any evidence specifically addressing how the use of  
16 diquat and endothall on the proposed sites would meet the four factors identified in *Fairhurst*. In  
17 the absence of such evidence, *Fairhurst* provides no basis for the Board to conclude a NPDES  
18 permit is not required for the proposed pesticide applications.

19 11.

20 The permitting situation presented during the 2005 treatment season was unusual and  
21 ultimately resulted in coverage becoming extremely difficult to obtain under the Noxious Permit.

1 This turn of events was inconsistent with the enunciated program goal of facilitating quick  
2 responses to damaging and invasive noxious weed infestations. Ecology's suggestion in early  
3 July that the applicant marinas obtain coverage for the 2005 season under the Noxious Permit  
4 was not particularly meaningful under the circumstances. Ecology's position leads to the  
5 incongruous result of disallowing the more rigorous review and permitting process under the  
6 Nuisance Permit in favor of the streamlined Noxious Permit process. Despite the logical flaw in  
7 this approach, the language in Condition S2 of the Nuisance Permit does support limiting  
8 coverage to those situations involving primarily nuisance weeds. The Board has concluded that  
9 Northwest Aquatics failed to show that the majority of the plants on the disputed sites were  
10 nuisance weeds. Thus, Ecology's decision should be affirmed under the provisions of Condition  
11 S2.

12 12.

13 Any Finding of Fact deemed to be properly considered a Conclusion of Law is hereby  
14 adopted as such.

15 Based upon the foregoing Findings of Fact and Conclusions of Law the Board enters the  
16 following:

17 ORDER

18 Ecology's decisions denying coverage under the Nuisance Permit for proposed pesticide  
19 applications at the Meydenbauer Bay Yacht Club, the Skinner Development Carillon Point, and  
20  
21

1 the Harbor Village Condominiums are AFFIRMED.

2 Done this 15<sup>th</sup> day of February 2006.

3 POLLUTION CONTROL HEARINGS BOARD

4 WILLIAM H. LYNCH, CHAIR

5 KATHLEEN D. MIX, MEMBER

6 Phyllis K. Macleod  
7 Administrative Appeals Judge